

the liquidator the sum of \$37,500 with interest thereon at 6% per annum from September 27, 1961 to date of payment;

6. Order that the 12 respondents do pay to the liquidator his costs of and incidental to these applications to be taxed in default of agreement.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Jayadeva, Zahir & Ismi; Lim Cheng Ean & Co.*

MUNUSAMY v. PUBLIC SERVICES COMMISSION

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Neal J.) February 21, 1964]

[K.L. — Federal Court Appeal No. 5 of 1964].

Constitutional Law — Public services — Restriction on dismissal and reduction in rank — Reversion not amounting to reduction in rank — Constitution of the Federation of Malaya, article 135 — Certiorari.

Specific Relief — Mandamus — Specific Relief (Malay States) Ordinance, 1950, s. 44.

The appellant an Assistant Immigration Officer of about 7 years service applied on February 21, 1957 for the post of Assistant Passport Officer for service in the then Federation of Malaya Government Overseas Missions in answer to an advertisement in the *Malay Mail* newspaper dated February 19, 1957. One of the qualifications necessary for this appointment was that the applicant should possess a "School Certificate". The appellant in his application stated "I passed my School Certificate." On August 21, 1957 the appellant was informed by letter from the Chief Secretary's Office that he had been selected for appointment as Assistant Passport Officer, External Affairs Service, on probation. On August 25, 1957 the appellant left for Karachi where he assumed duties as Assistant Passport Officer in the office of the High Commissioner for the then Federation of Malaya in Pakistan. Sometime on or before November 6, 1957 the Public Services Commission came to know that the appellant did not possess the Cambridge School Certificate and on November 30, 1957 the appellant received a letter from the Permanent Secretary, Ministry of External Affairs recalling him for reposting. On his return the appellant found that criminal proceedings were being taken against him for an offence under section 182 of the Penal Code. In the meantime on February 10, 1958 the Controller of Immigration informed the appellant that because of the criminal proceedings he had been interdicted from duty on half monthly emoluments with effect from January 24, 1958. Then on May 23, 1958 after the prosecution appeal had failed the secretary of the respondents informed the appellant that as he had not passed the School Certificate as required he was underqualified for the appointment and that it had been decided to terminate his appointment as Assistant Passport Officer and that he would revert to his former post on the terms and conditions under which he was serving before his appointment to the External Affairs Service. The appellant commenced proceedings in which he prayed for an order of *certiorari* to bring up and quash the decision of the Public Services Commission contained in their letter of the May 23, 1958 and for a consequential order of *mandamus* against the Commission. Ong J. dismissed the application but made no order as to costs ([1960] M.L.J. 221). On appeal,

Held: as the appellant was reverted back to his former post as probationary passport officer (because he did not have the necessary qualification) there was

A never any hiatus in his employment in the public service nor can it be said that he suffered a punishment by his removal on that ground. There was therefore neither a dismissal nor a reduction in rank within the meaning of article 135(2) of the Constitution.

[Editorial Note: Mr. Justice Neal, the third member of the Federal Court left Malaysia on retirement without giving his judgment and in accordance with section 16(2) of the Courts Ordinance, 1948, where there is no majority decision, the decision of the trial Court shall stand. Section 16 has since been repealed by the Courts of Judicature Act, 1964 (w.e.f. 16-3-64): see now section 42 of the Act which provides for re-hearing].

Cases referred to:—

- (1) *Shyam Lal v. State of Uttar Pradesh* A.I.R. 1954 S.C. 369.
- (2) *Satish Chandra v. The Union of India* A.I.R. 1953 S.C. 250.
- (3) *P.L. Dhingra v. Union of India* A.I.R. 1958 S.C. 36.
- (4) *Adegbenro v. Akintola* [1963] 3 W.L.R. 63.
- (5) *Laxminarayan Chironjilal Bhargava v. The Union of India* A.I.R. 1956 Nagpur 113.

D FEDERAL COURT.

V. Kandiah Palasuntharam for the appellant.

Au Ah Wah (Treasury Solicitor) for the respondents.

Cur. Adv. Vult.

E Thomson L.P.: This is an appeal from a decision of the High Court dismissing an application by a Mr. Munusamy for an order of *certiorari* to bring up and quash a decision relating to him made by the Public Services Commission and for an order of *mandamus* against the Commission.

F The facts of the case are not in dispute.

G Early in the year 1957 the then Government was engaged in preparing for Independence which was expected later in the year and did in fact come into effect on 31st August. In this connection it was known that under the new Constitution the general public service (and certain other services) would be controlled by a Public Services Commission and that staff would have to be recruited for the diplomatic missions which would have to be set up abroad.

H With regard to the first of these matters the then Government nominated a body of persons who would become the Public Services Commission under the new Constitution with a view to their obtaining experience of their future duties. This body of persons was called the "Public Services Commission (Designate)" and had no legal standing. It dealt in an advisory capacity with applications for appointment and other matters but appointments were actually made by the Chief Secretary to the Government.

I With regard to the recruitment of persons for overseas missions an advertisement was inserted in the *Malay Mail* on 19th February, 1957. That advertisement commenced as follows:—

"Applicants are invited from Federal Citizens for posts of ASSISTANT PASSPORT OFFICER for service in Federation of Malaya Government Overseas Missions. Applicants will be selected according to the following order of preference: (i) Serving Assistant Passport Officers and serving Junior Assistant Passport Officers in the Immigration Department who have had not less than 5 years' service and possess School Certificate. (ii) All serving Government officers who have had 5 years' service and who possess School Certificate. (iii) Persons not in Government Service who have School Certificate with a credit in English, and who attained the age of 22 but have not attained the age of 30."

It then set out the terms of appointment and concluded by stating that applications should be sent to "the Secretary, Public Services Commission (Designate)".

With regard to that advertisement I pause to make two observations.

First, applications were invited not only from serving public servants but also from persons not in the service of Government.

Second, applicants were required to possess a "School Certificate". By that expression it is said, and this of course is probably true, that the persons issuing the advertisement intended to refer to what is known as the Cambridge School Certificate and it is also said that this certificate is well known to represent a certain standard of educational attainment for persons wishing to be appointed to the service of Government. Perhaps, however, it was not as clear to prospective applicants as it might have been that in this particular case it was such a "School Certificate" that was what was intended. There was room for misunderstanding on the point. At the time there was a great deal of recruitment of public servants. The anticipated expanding activities of an independent Government called for increased staff and, moreover, it was known that large numbers of locally domiciled persons would be required to replace Government servants of foreign domicile who would shortly be departing. Again, in other advertisements relating to Government employment which were published about the same time the expression "Cambridge School Certificate" was used. In the circumstances it was perhaps not so clear as it would be to-day that "School Certificate" meant "Cambridge School Certificate" and, to put it at the lowest, it might not have been wholly absurd to think that for the time being normal educational requirements were being relaxed.

To proceed, on 21st February, 1957, Mr. Munusamy who was then an Assistant Immigration Officer and had been in the service of Government for about seven years applied for one of the advertised appointments and in the course of his letter he said "I passed my School Certificate". Now, it is common ground that Mr. Munusamy had not "passed" the Cambridge School Certificate. He had, however, a docu-

ment signed by the Principal of the Methodist Boys' School, Kuala Lumpur, which was headed "Leaving Certificate". This purported to show that he had been at that school from 1935 till 1949 and stated among other things:—

"Standard at time of leaving: School Certificate Class (Camb.)"

Reason for leaving: Graduated."

Just when this document was first seen by anybody connected with the Public Services Commission seems to be in some doubt. But about 16th May, 1957, Mr. Munusamy appeared before an interview board consisting of members of the Public Services Commission (Designate) one of whom was a Mr. Singaram. It is not clear what happened at that interview. In subsequent criminal proceedings Mr. Singaram said Mr. Munusamy produced some sort of certificate which was not the certificate that has been mentioned but had to admit that he was not sure whether or not he saw a Cambridge School Certificate.

Whatever happened at that interview, on 21st August, 1957, a letter was addressed to Mr. Munusamy by the Deputy Chief Secretary to the Government the material portions of which read as follows:—

"I am directed to inform you that you have been selected for appointment as an Assistant Passport Officer in the External Affairs Service. The date of appointment will be the date of your embarkation for your overseas post and the appointment will extend for a period of 3 years in the first instance.

4. You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period."

Mr. Munusamy accepted the offer conveyed to him in that letter and he was posted to the office of the High Commissioner in Pakistan and embarked for Karachi on 25th August, 1957, which accordingly in terms of the letter addressed to him became the date of his appointment. While there, I should add, it is common ground that he performed his duties to the entire satisfaction of his superiors.

In the meantime, on 31st August, 1957, the Constitution had come into force and as from that date the Public Services Commission came into being clothed with all the powers and duties given to and laid upon it by the Constitution.

Then on a date which does not appear in the evidence but was certainly not later than 6th November, 1957 (see page 41 of the supplementary record of appeal) it came to the knowledge of the Public Services Commission that Mr. Munusamy did not possess the Cambridge School Certificate, and that, indeed, in 1949 when he had sought to obtain that academic distinction he had failed lamentably to pass the necessary

examinations. On this it was apparently thought that he had committed some sort of criminal offence in connection with his application for the post of Assistant Passport Officer for the Police were brought into the matter. Some time later, on 30th November, 1957, the Permanent Secretary to the Ministry of External Affairs addressed to Mr. Munusamy the following letter which in view of the fact that preparations were being made to prosecute him for a criminal offence can hardly be described as a model of candour:—

"I am directed to inform you that you are to be recalled for re-posting and that you should make arrangements for your departure from Karachi within three days of the arrival of your relief who is expected to arrive in Karachi during the second week of December, 1957.

On your return to the Federation, you should report direct to the Controller of Immigration, Penang."

In accordance with these instructions Mr. Munusamy returned to Malaya and on 10th January, 1958, the Police took out a summons against him and he realised that his "re-posting" was to the dock of the Sessions Court at Kuala Lumpur.

In due course Mr. Munusamy came up for trial for an offence in contravention of section 182 of the Penal Code, an offence punishable with six months' imprisonment. The charge against him was as follows:—

"That you on or about the 16th May, 1957 at Kuala Lumpur in the State of Selangor, gave to a public servant namely Mr. Singaram, a permanent member of the Public Services Commission, an information, namely that you have passed the School Certificate examination in 1949, which information you knew to be false intending thereby to cause the said public servant to do a thing which such public servant ought not to have done if the true state of facts respecting such information was known to him to wit to recommend you for the appointment of Assistant Passport Officer in the Government Overseas Missions, and you did thereby commit an offence punishable under section 182 of the Penal Code."

At the close of the case for the prosecution the Sessions Court dismissed the summons without calling on the defence on the ground that on the material date Mr. Singaram was not a public servant within the meaning of the Penal Code and an appeal by the prosecution against that decision was dismissed by the High Court on 1st May, 1958.

In the meantime, on 10th February, 1958, after the summons had been dismissed but while the prosecution appeal was still pending, the Controller of Immigration addressed the following letter to Mr. Munusamy:—

"I am directed to inform you that you are interdicted from duty on half monthly emoluments with effect from 24th January 1958; authority P.S.C. 2702/3/2 dated 25th January, 1958.

2. Your interdiction is in connection with the criminal proceedings which were instituted against you which are, I understand, still sub-judice in view of an appeal having been lodged.

3. The reason you have not been officially informed of your interdiction previously is because it was thought that the Ministry of External Affairs had informed you."

Then, on 23rd May, 1958, after the failure of the prosecution appeal, the Public Services Commission shifted their ground and the Secretary addressed the following letter to Mr. Munusamy:—

"I am directed to refer to Chief Secretary's Office letter under reference C.S.O. 58/28 dated the 21st August, 1957 notifying you of your selection for the above mentioned post and also to your acceptance of the appointment.

2. I am to say that it has come to the knowledge of this Commission that you have not passed the School Certificate required as claimed by you and that you are therefore underqualified for the appointment. After due consideration of the circumstances and of the necessity to maintain the standards of the External Affairs Service and in fairness to other properly qualified candidates and appointees, it has been decided to terminate your appointment as Assistant Passport Officer, External Affairs Service on probation, with effect from the date of this letter.

3. You will revert to your former post in the Immigration Department on the terms and conditions under which you were serving before appointment to the External Affairs Service."

Thereafter a lengthy and acrimonious war of letters was waged between Mr. Munusamy's then lawyer and the Public Services Commission which it is not necessary to review here and ultimately on 27th February, 1959, the present proceedings were commenced in which Mr. Munusamy prayed for an order of *certiorari* to bring up and quash the decision of the Public Services Commission contained in the letter of 23rd May, 1958 and for a consequential order of mandamus against the Commission.

In the event the matter came on for trial before Ong J. who dismissed the application but made no order as to costs. Against that decision Mr. Munusamy has now appealed.

Now, a great deal of irrelevant matter has been introduced into the case by both sides. Leaving that aside, however, I do not think it is unfair to either side to say that Mr. Munusamy's case is and has been that what was done to him was unlawful and a nullity by reason of certain provisions of the Constitution which I shall proceed to discuss as they existed at 23rd May, 1958, which is the material date in the case.

Article 139 constitutes a Public Services Commission "whose jurisdiction, subject to article 144, shall extend to all persons who are members" of certain services which include the "general public service of the Federation".

The "jurisdiction" of the Commission is dealt with in article 144 the relevant portion of which reads as follows:—

"Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to

appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends."

Finally there is article 135(2) which provides that no member of the general public service of the Federation "shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard".

Article 132(2A), which provides that members of the public services hold office during the pleasure of the Yang di-Pertuan Agong, did not come into force till 31st May, 1960.

Mr. Munusamy's case is that he has been dealt with in contravention of article 135(2). He says that at all material times he was a member of the general public service of the Federation, that what was done to him constituted dismissal or reduction in rank and that he has not been given a reasonable opportunity of being heard.

With regard to his being a member of the general public service of the Federation it is unnecessary to discuss the point at any length because the Commission, who are the only respondents to his application, are estopped from denying that he is such a person by reason of their having purported to deal with him at all. In any event, if he was not a member of that service they had no power to deal with him in any way and that is the end of the matter, his purported dismissal by them becomes a nullity.

Passing by for the moment the question of whether he was dismissed or reduced in rank within the meaning of the article, there can be no question of his having been given a reasonable, or indeed any, opportunity of being heard at any time before he received the letter of 23rd May, 1958, which informed him it had been decided to terminate his appointment. There is nothing to show that he was afforded even any suggestion that his appointment might be in peril till he was served with the summons in the Sessions Court prosecution. He was then faced with the danger of a criminal conviction which might involve a sentence of imprisonment and it would be in the highest degree unreasonable to expect him to have forgone taking advantage of a technical defence (which was a good one) simply to secure the benefit of being able to give evidence on his own behalf which might not have been believed.

The only question, then, to be decided is, was he "dismissed or reduced in rank" within the meaning of article 135(2)?

Here it is to be observed that whether what was done to him amounted to "dismissal" or "reduction in rank" is not really very important. His lawyers in the correspondence that preceded litigation treated it as dismissal, but the dis-

inction is irrelevant to the question as to whether or not his treatment came within the scope of article 135(2). Before his appointment as an Assistant Passport Officer he was an Assistant Immigration Officer; after he received the letter of 23rd May, 1958, he was again an Assistant Immigration Officer. But according to the terms of the advertisement of 19th February, 1957, persons not in the employment of the Government were also eligible for appointment as Assistant Passport Officers and had Mr. Munusamy been unemployed immediately prior to his appointment then the consequence of what was done to him would have been that after 23rd May, 1958, he would again have been unemployed. What is in issue is a question of construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard. That question of construction is a question of law and in its determination any consideration of the antecedents of the person involved or of consequences to him must be disregarded. As a matter of law how can it be argued that there is any distinction between the case of a man who will become unemployed and that of one who has another appointment waiting for him any more than between the case of a poor man and that of a man who has just inherited a fortune? The one may be reduced to want and suffering, the other may suffer no material discomfort but that has nothing to do with the question of whether the termination of his services amounts to dismissal. How can it be said that an act in itself lawful becomes unlawful only because it produces evil consequences or that an act in itself unlawful becomes lawful simply because it produces no evil consequences?

Proceeding, then, on the basis that Mr. Munusamy was dismissed we come to the real matter of difficulty in the case. Ong J. took the view, following the views of the Indian Courts on the corresponding article [article 311(2)] of the Indian Constitution, that article 135(2) only applies in the case of dismissals inflicted in pursuance of the power to "exercise disciplinary control" given to the Commission by article 144 and to determine whether a dismissal was made in the exercise of disciplinary control he adopted the tests applied by the Supreme Court of India in relation to article 311 of the Indian Constitution in the case of *Shyamal v. State of Uttar Pradesh*.⁽¹⁾ "In their view" he said:—

"removal or dismissal involved 'the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer'; another distinguishing characteristic of dismissal or removal is that it is a punishment, imposed on an officer as a penalty, involving loss of benefit already earned;"

Applying those tests he concluded as follows:—

"In the present case no imputations of any sort whatsoever were made against the applicant, and the termination of his probationary appointment was professedly an administrative measure dictated by public interest, and not ordered as a penalty or disciplinary action. The applicant's Counsel raised no argument on this point, and, although it was submitted that the respondents had terminated the applicant's appointment 'without cause or justification in law' there was never any suggestion that the respondents did not come to their decision in good faith, or that the reason which they gave was inadequate. The indisputable fact is that he never possessed the School Certificate, and was therefore under-qualified for the appointment, and the respondents, having discovered their error, albeit a little late, took necessary action to rectify the matter. I am accordingly of opinion that the termination of the applicant's appointment in those circumstances does not amount to a dismissal to which the provisions of article 135(2) would apply."

With great respect it is a little difficult, having regard to the history of the matter, to take the view that Mr. Munusamy's dismissal was nothing more than an "administrative measure". That, however, is not the question. The question is whether it was a dismissal which fell within the scope of article 135(2).

In this connection I am not prepared to agree that the views of the Supreme Court of India regarding the effect of article 311(2) of the Indian Constitution are very much in point in arriving at a correct interpretation of article 135(2) of our Constitution.

Article 311(2) of the Indian Constitution (which is based on section 240 of the Government of India Act, 1935) provides that no member of certain public services in India "shall be dismissed or removed or reduced in rank" without being given "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" and the views of the Indian Courts are to be found in the cases of *Satish Chandra v. The Union of India*,⁽²⁾ *Shyam Lal v. State of Uttar Pradesh*, *supra*, and *P. L. Dhingra v. Union of India*.⁽³⁾

It is not an unfair summary of the exhaustive and careful process of reasoning on which these cases were decided to say that ultimately the expression "dismissed or removed or reduced in rank" in article 311(2) was interpreted in the light of the terms of rule 49 of the Civil Services (Classification, Control and Appeal) Rules, 1930, which were originally made by the Secretary of State for India under section 96B of the Government of India Act, 1919, and which now derive their force from the All India Services Act, 1951 (Act LXI of 1951) enacted by Parliament under article 310 of the Constitution. Rule 49 appears in the part of the Rules entitled "Conduct and Discipline" and the relevant portions of it read as follows:—

"The following penalties may... be imposed... namely... (vi) removal from the Civil Service of the Crown, which does not disqualify from future employment, (vii) dismissal from the Civil Service of the

A Crown, which, ordinarily disqualifies from future employment.

Explanation. The discharge (a) of a person appointed on probation, during the period of probation, (b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment, (c) of a person engaged under contract, in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule."

B From a consideration of the terms of that Rule the conclusion has been drawn by the Indian Courts that dismissal or removal for the purposes of article 311(2) means dismissal or removal inflicted as a punishment under rule 49, that neither expression includes any discharge of a person which falls within the scope of the "Explanation" to the rule and that the distinction between the two terms in the Constitution was the same as that contained in the rule.

C Now, with the utmost respect, that course of reasoning, as was pointed out by Bose J. in his dissenting judgment in the case of *Dhingra*, *supra*, is open to the fatal criticism that it involves controlling the interpretation of a provision of the Constitution itself by reference to a piece of subsidiary legislation made under it. The only excuse for such a course, if it be an excuse, is that it was rendered necessary, as was shown in the case of *Chandra*, *supra*, by the apparent impossibility that otherwise existed of drawing a distinction between the expressions "dismissal" and "removal". That difficulty, however, does not arise in the interpretation of our article 135(2) which speaks only of dismissal. Nor is there anything in the terms of our Public Officers (Conduct and Discipline) Regulations, 1956, made under clause 14 of the Federation of Malaya Agreement, as amended by Ordinance No. 1 of 1953, which corresponds to rule 49 of the Indian Rules.

D For these reasons, in my view, the Indian cases should be disregarded in the interpretation of our article 135(2) and that question should be approached as *res integra*. As was said by Lord Radcliffe in the case of *Adegbenro v. Akintola* ⁽⁴⁾ (at p. 73) :—

"It is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

H It is to be observed that the terms of article 135(2) are categorical: "no member of such a service as aforesaid" (and that includes the general public service) "shall be dismissed... without being given a reasonable opportunity of being heard". What is in question is employment and that being so "dismissed" is to be construed in its application to the employment of servants. Generally and considered in isolation the word "dismissal" may be used as an expression to denote any termination of employment.

Used, however, in connection with the relationship of master and servant (as it is in article 135(2) it clearly means the putting an end to the servant's service by the master. Literally it is the "sending away" of the servant and for myself I can find no grounds for placing any artificial restricted meaning on the expression as used in article 135(2).

It is true that the prohibition contained in article 135(2) does not apply in terms to the Public Services Commission. But it is equally true that the Public Services Commission are nowhere in terms given any power to dismiss anybody. If they have any such power it must be derived from article 139(1) which says that their jurisdiction shall extend to all persons who are members of certain specified services including the general public service of the Federation or article 144(1) which empowers them to exercise disciplinary control. The point, however, is of academic interest only, for the words of article 135(2) are crystal clear and there is not a word from beginning to end of the Constitution that gives the Commission power to effect a dismissal which does not attract the provisions of that article.

Thus in the present case a dilemma again arises. Either the Public Services Commission had the power to dismiss Mr. Munusamy or they did not have that power. If they had that power they exercised it without complying with article 135(2) and the exercise is therefore a nullity. On the other hand if they did not have that power again the purported exercise of a power they did not possess is equally a nullity.

I am therefore compelled to the opinion that this appeal should be allowed and an order should be made calling for and quashing the decision of the Public Services Commission conveyed to Mr. Munusamy in their letter of 23rd May, 1958. Once that is done there can be no question of making an order of mandamus at this stage because Mr. Munusamy's appointment as an Assistant Passport Officer was for a period of three years only and accordingly came to an end on 24th August, 1960.

As regards the question of whether he is entitled to any other remedy as against the Government, such as damages for wrongful dismissal or a declaration of some sort, it would be wrong to express any view for the reason that the Government has not been joined as a party to these proceedings.

Barakbah C.J. (Malaya): This is an appeal from the decision of Ong J. dismissing the application by way of motion by the appellant for an order of *certiorari* to quash the decision of the respondents terminating the appointment of the appellant as a probationary Assistant Passport Officer and reverting him to his previous post of Immigration Officer with effect

A from 23rd May 1958, and for an order in the nature of a mandamus requiring the respondents to reinstate the appellant as Assistant Passport Officer in the External Affairs Service on probation.

B The facts in this case are given in full by the learned trial judge and it is unnecessary for me to give them in detail. Briefly the facts are as follows:

C In answer to an advertisement in the *Malay Mail* newspaper dated 19th February 1957 inviting applications for posts of Assistant Passport Officer for service in the Federation of Malaya Government Oversea Missions, the appellant who was a serving Government Officer with more than five years' service as an Immigration Officer submitted his application. One of the qualifications necessary for the new appointment was that the officer should possess a "School Certificate". In May 1957 he was interviewed by the interviewing board of the Public Services Commission. On 21st August 1957, the appellant was informed by letter from the Chief Secretary's Office that he had been selected for the appointment as Assistant Passport Officer and paragraph 4 of the said letter stated as follows:

E "You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period."

The date of appointment would take effect from the date of embarkation for his overseas post.

F On August 25th 1957, the appellant left for Karachi where he assumed duty as Assistant Passport Officer in the office of the High Commissioner for the Federation of Malaya in Pakistan. On 30th November 1957, a letter was sent to the appellant by the permanent secretary to the Ministry of External Affairs recalling him for reposting. This was due to certain investigations made by the police in October 1957. On his return he was charged in the Sessions Court as follows:—

H "That you on or about the 16th May, 1957 at Kuala Lumpur, in the State of Selangor, gave to a public servant, namely, Mr. Singaram, a permanent member of the Public Services Commission, an information, namely, that you have passed the School Certificate examination in 1949, which information you knew to be false, intending thereby to cause the said public servant to do a thing which such public servant ought not to have done if the true state of facts respecting such information was known to him, to wit, to recommend you for appointment of Assistant Passport Officer in the Government Overseas Missions, and you did thereby commit an offence punishable under section 182 of the Penal Code."

I He was acquitted by the Sessions Court on 27th January 1958 and there was an appeal to the High Court against such order and the appeal was dismissed on 5th May 1958. On 23rd May 1958 the Secretary to the Public

Services Commission sent a letter to the appellant in the following terms:

"2. I am to say that it has come to the knowledge of this Commission that you have not passed the School Certificate required as claimed by you and that you are therefore under-qualified for the appointment. After due consideration of the circumstances and of the necessity to maintain the standards of the External Affairs Service and in fairness to other properly qualified candidates and appointees, it has been decided to terminate your appointment as Assistant Passport Officer, External Affairs Service on probation, with effect from the date of this letter.

3. You will revert to your former post in the Immigration Department on the terms and conditions under which you were serving before appointment to the External Affairs Service."

There was considerable correspondence between the respondents and the appellant which I need not set out in detail here. The reason for the step taken against the appellant was that set out in the letter dated 23rd May 1958 and in paragraph 2(7) of the letter of the 13th November 1958:

"It is the practice where a probationary officer's qualification have later been found not to be such as are required and as he has claimed, that the officer's appointment has been terminated. This is not only reasonable, but Government's duty in the interests of the taxpayer and the public, to maintain the public service at a proper standard and in the interests of other serving officers who are properly qualified, and in fairness to other candidates not considered for selection because they were underqualified."

These briefly are the facts of the case.

At the hearing of the appeal before this court it was agreed by counsel for both parties that the only issue for the decision of this court was whether the appellant was dismissed or reduced in rank within the meaning of article 135(2) of the Federation of Malaya Constitution.

Article 135 states:

135(1) No member of any of the services mentioned in paragraph (b) to (g) of clause (1) of article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without a reasonable opportunity of being heard."

The wording of this article is similar to that of article 311 of the Indian Constitution. Therefore, two questions have to be decided: (1) Was the appellant dismissed? or (2) Was he reduced in rank?

I shall deal with question No. 2 first. It would appear from the pleadings that it was never the contention of both parties that there was promotion for the appellant. In letter "RM-18" dated 16th September 1958, at page 78, paragraph (c) of the supplementary record of the appeal, the Secretary, Public Services Commission stated:

"Mr. Munusamy was not promoted from the grade

A of Junior Assistant Passport Officer to that of Assistant Passport Officer nor was he promoted from the grade of Immigration Officer to Assistant Passport Officer. He was appointed to be an Assistant Passport Officer in the External Affairs Service on probation as a result of an appointment competition open to serving Assistant Passport Officers and Junior Assistant Passport Officers, serving Government Officers having five years' service and possessing School Certificate with a credit in English."

B In reply Dato Rajasooria, counsel for the appellant, in letter "RM-19" dated 18th September 1958 at page 83 said:

"With reference to your reply in your said letter dated 16th September 1956 to paragraph 3(d) of my said letter dated 12th June 1958 and with reference to paragraph 3 of your said letter dated 16th September 1958 it has never been my contention that Mr. Munusamy was promoted from the grade of Junior Assistant Passport Officer to the Grade of Assistant Passport Officer. It is my contention also that Mr. Munusamy was appointed an Assistant Passport Officer and therefore the purported termination of his said appointment is a dismissal and since the said purported termination was made without his having been given, 'A reasonable opportunity of being heard' the said purported termination is *ultra vires* the Government in view of article 135(2) of the said Constitution."

In my view as there was no promotion, the question of reduction in rank did not arise. All the respondents did was to revert him to his former position. Apart from the pleadings, the learned trial Judge had dealt fully with the question of reduction in rank and with respect I agree with him.

So there remains only the question of dismissal. The appellant was appointed on probation for one year and before the period expired he was recalled by letter for reposting. On his return he was charged in the Criminal Court for an offence under section 182 of the Penal Code. The criminal action against him failed and subsequently his appointment as Assistant Passport Officer was terminated and he was reverted to his former post in the Immigration Department. The appellant then filed an application to the High Court by way of motion for *certiorari* and *mandamus* and his application was dismissed. He now appeals to this court from the decision of the learned trial Judge.

The point at issue is whether the terminating of the appellant's appointment on probation amounted to a dismissal. It is not in dispute that the appointment of Assistant Passport Officer is a permanent one. Now the words that require consideration are "on probation" and "dismissal." In *P. L. Dhingra v. Union of India* (3) S.R. Das C.J., states (at p. 42):

"An appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. The period of probation may in some cases be for a fixed period, e.g., for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on

trial is found unsuitable and his service is terminated by a notice.

He then went on to say

"In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time."

With regard to dismissal I can do no better than quote the case of *Shyam Lal v. State of Uttar Pradesh and another* ⁽¹⁾ in which Das J. says (at p. 374) :

"Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal.... Our recent decision in *Satischandra Anand v. Union of India, supra*, fully supports the conclusion that article 311 does not apply to all cases of termination of service."

Another characteristic of dismissal or removal is that it is a punishment. This is imposed on an officer as a penalty. In *Laximinarayan Chironjilal Bhargava v. The Union of India* ⁽⁵⁾ the opinion of the court was:

"Penalty is necessarily by way of retribution or correction. Where an act is not intended to be either by way of retribution or correction, it cannot be regarded as a penalty at all. If the Departmental Promotion Committee declines to approve of the petitioner's promotion because of some shortcomings which it finds in his work and suggests his reversion to the substantive post, its action cannot be characterised either as by way of retribution or of correction."

In the present case, as he did not have the necessary qualification for the post of Assistant Passport Officer, namely the possession of a School Certificate, in my view, it cannot be said that he suffered a punishment by his removal on that ground.

Munusamy was in the public service for seven years prior to his appointment as probationary passport officer. He went back to the same public service when he was found under-qualified for confirmation. There never was any hiatus in his employment in the public service. He continued in the service, where he still is to-day. Then where is the dismissal? In my view, a shifting from one department to another is an administrative decision to which article 135(2) does not apply.

Here there was neither dismissal nor reduction in rank. Therefore, in my opinion the question of '*audi alteram partem*' does not arise.

I have referred to some Indian Authorities in this judgment and as the learned trial Judge had remarked, although they have no binding force in our courts, they are entitled to consideration as they are relevant to the present case.

It seems to me that the learned trial Judge had dealt with the matter carefully and thoroughly in his judgment and with respect I agree with his reasoning and finding and I would

therefore dismiss the appeal. I make no order as to costs.

As this is a case which concerns the Government and its employees it would be well to quote the observations made in the case of *Laximinarayan Chironjilal Bhargava v. The Union of India, supra*:

"In the interest, not only of the employees of Government but also in that of the administration itself, the authorities concerned should observe the law and the rules not merely in form but also in spirit. Where that has not been done, the error can be easily rectified by a reconsideration of the matter after hearing the employee who feels aggrieved by the action taken against him. Such a course instead of showing any weakness on the part of the authorities, will not only clear them of a charge of lack of sympathy for their subordinates but would go a long way towards promoting confidence in the mind of the subordinates in the sense of justice and fair play on the part of their superiors."

Appeal dismissed.

TAN TOH CHIN & ORS. v. SIJHADI PEER BAKSH & ORS.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) March 16, 1964]

Damages — Fatal accident — Loss of support — Compensation — Civil Law Ordinance (Cap. 24), s. 12.

Road Traffic — Round-about — Right to use — Whether cyclist on round-about should give signal.

The accident in question took place at the round-about at 7¼ milestone, Bukit Timah Road, Singapore. The deceased, a night watchman, aged 50, was on a bicycle proceeding south on Bukit Timah Road and while negotiating the round-about 4 to 5 feet from its outer-edge, a motor-van driven by the 1st respondent came from the north and knocked him down at the mouth of the New Bukit Timah Road as a result of which he died 4 days later. The widow and children sued the owners and driver of the van under section 12 of the Civil Law Ordinance for loss suffered by them.

The learned trial judge found that (i) the 1st respondent was travelling at a speed far in excess of 30 miles per hour, (ii) the cause of the accident was the failure of the 1st appellant to reduce the speed of the vehicle on entering the round-about, and (iii) the deceased was 20% to blame for the accident. The learned trial judge assessed compensation at \$20,000 but awarded \$16,000 as the deceased was 20% to blame. The appellant appealed against the whole of the decision of the learned trial judge and the respondents cross-appealed on the finding of contributory negligence.

Held: (1) as the deceased was right on the round-about, he was not in any way obliged to see that there was any traffic coming from behind so as to make it safe for him to proceed in the direction he was going;

(2) since the 1st appellant was driving at a great speed and since it was not the duty of the deceased to give any signal when he was taking the round-about, there was no contributory negligence on the deceased's part. The amount of compensation at \$20,000 as assessed by the trial judge maintained.

FEDERAL COURT.

J. D. Donnelly for the appellants.

N. A. Christopher for the respondents.